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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

9 United States of America,

10 Plaintiff,

11 vs.

12 Billy Ray Newman,

13 Defendant.  
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CR CR-02-965-PHX-ROS

**ORDER**

16 Defendant Billy Ray Newman ("Newman") alleges that his Fourth Amendment rights  
17 were violated when his arresting officer arrested and searched him without probable cause.  
18 Newman moves to suppress the results of this allegedly illegal search. For the reasons given  
19 below, the Court grants the Motion.

20 **BACKGROUND**

21 On September 24, 2002, the grand jury returned a three count Indictment against  
22 Newman as follows: Count 1, felon in possession of a firearm on June 14, 2002, in violation  
23 of 18 U.S.C. §922(g)(1); Count 2, possession of methamphetamine with the intent to  
24 distribute in violation of 21 U.S.C. §841(a); and Count 3, knowingly carrying a firearm  
25 during and in relation to a drug trafficking crime in violation of 18 U.S.C. §924(c)(1)(A).

26 The matter comes before the Court on Newman's Motion to Suppress (Doc. #19). An  
27 evidentiary hearing occurred on February 20, 2003, followed by supplemental memoranda  
28 from both parties.

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1 **FACTS**

2 On June 14, 2002, while conducting neighborhood patrol, Phoenix Police Officers  
3 Nicholas Pittatsis and Stephen Roberts encountered a vehicle with a Utah license plate  
4 parked in front of a house at 5128 W. Monte Vista Road. The officers observed a woman  
5 sitting inside the vehicle on the driver's side and a man, Newman, standing at the trunk.  
6 Both officers had prior information concerning the occupants of the house and their vehicles.  
7 Moreover, both officers knew of prior illegal domestic violence occurring at the house and  
8 the recovery of stolen vehicles on the same street.

9 Not recognizing the woman and Newman as occupants of the house and unfamiliar  
10 with the vehicle, the officers suspected the vehicle was stolen. Officer Roberts instructed  
11 Officer Pittatsis to run a check on the vehicle. They confirmed that the vehicle was stolen,  
12 and the officers turned their car around and went back to the house.

13 As they pulled up to the house, the officers observed Newman leaving the vicinity of  
14 the vehicle and walk to the front door. Because Officer Pittatsis was physically closest to  
15 Newman at the time the officers parked their car, he took responsibility for Newman, while  
16 Officer Roberts focused on the woman.

17 From this point forward, the facts are vague because the memories of Officer Roberts  
18 and Pittatsis differ on material issues. Adding to the surfeit of obscurity, Officer Pittatsis'  
19 memory of the events differs significantly from what he recorded in his DR immediately after  
20 the events, what he stated during an individual interview with defense counsel, and what he  
21 testified to during the hearing held on February 20, 2003.<sup>1</sup>

22 **1. Evidence Attributed to Officer Roberts**

23 Officer Roberts completed a DR, interviewed with defense counsel, and testified at  
24 the Court's February 20, 2003 hearing regarding his recollection of the events surrounding  
25 Newman's arrest.

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27 <sup>1</sup> The Court notes that reasonable and honest memories may differ. Therefore, the  
28 Court declines to conclude that the officers intentionally gave untruthful information or  
testimony, nor does the Court imply bad faith from these inconsistencies.

1 According to Officer Roberts, he approached the woman sitting in the vehicle and  
2 "asked her to turn off the ignition and hand [him] the key." DR at 12. When she did not  
3 respond, Officer Roberts repeated his question "several" times. Id.; IR at 5. In particular,  
4 during the hearing, Officer Roberts stated that he repeated his question "more than once" and  
5 "possibly three times." TR at 59. Officer Roberts admitted that his attention focused  
6 primarily on the woman and only partially on his partner, who took charge of Newman. Id.  
7 Eventually, the woman handed Officer Roberts the keys to the vehicle and he asked her to  
8 step out of the vehicle. Id. at 61; DR at 12. The woman stated "'Don't tell me this car is  
9 stolen,'" and she became extremely nervous and upset. DR at 12; TR at 56. Then, either  
10 prior to leaving the car or while in the process of leaving the car, Officer Roberts asked the  
11 woman if the man standing at the front door with his partner was with her and if he had been  
12 in the car with her. DR at 12; TR at 69-70. The woman responded ambiguously: "Yes, that's  
13 my boyfriend." DR at 12; TR at 56. After receiving this information, Officer Roberts held  
14 up his index finger as a signal to Officer Pittatsis to arrest Newman. DR at 12; IR at 12; TR  
15 at 56. Officer Roberts explained that this signal represented that probable cause existed to  
16 arrest Newman for a crime, and that there was "no possibility of ambiguity" in the  
17 interpretation of the signal. TR at 80.

18 Officer Roberts initially estimated that "thirty seconds" transpired from the time he  
19 began interviewing the woman until he signaled Officer Pittatsis. TR at 83. However, after  
20 further questioning, he conceded that "[i]t might have been longer. It wasn't very long." TR  
21 at 84. Officer Roberts was emphatic, however, that when he signaled to Officer Pittatsis,  
22 Newman was not yet in handcuffs. Id.; IR at 20; DR at 12. In Officer Roberts opinion,  
23 Officer Pittatsis saw his signal and responded by placing handcuffs on Newman. TR at 57.  
24 Officer Roberts did not recall that he later conversed with Officer Pittatsis about whether  
25 there was a connection between the woman and Newman. IR at 12-3; TR at 67. Moreover,  
26 Officer Roberts conceded that if such a conversation had occurred, he would "hopefully"

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1 have included it in his DR, but his DR fails to mention such a conversation with Officer  
2 Pittatsis. Id.

3 Officer Roberts explained that he questioned the woman regarding Newman because  
4 he did not believe that probable cause existed to arrest Newman when he pulled up to the  
5 house. IR at 15-6, 19; TR at 65-66. During an earlier interview, Officer Roberts also stated  
6 that at the time he questioned the woman, he did not know if Newman arrived in the car with  
7 the woman or exited from the house to greet her. Id.

## 8 **2. Evidence Attributed to Officer Pittatsis**

9 Officer Pittatsis also prepared a DR, was interviewed by defense counsel, and testified  
10 at the February 20, 2003 hearing regarding his recollection of the events surrounding  
11 Newman's arrest. However, unlike Officer Roberts, Officer Pittatsis' recollection of events  
12 changed with the passage of time.

13 In his DR, Officer Pittatsis wrote that he approached Newman, who was attempting  
14 to open a locked security door on the front of the house while holding a cellular phone and  
15 a brown wallet in his hands. DR at 5. Officer Pittatsis' DR then reads that he:

16 immediately conducted a pat down of Newman's waist area as a protective  
17 measure for officer[s] safety reasons. During the pat down, [Officer Pittatsis]  
18 felt a hard object in Newman's back right jeans pocket and a bulging object in  
19 his front left jeans pocket. *[Officer Pittatsis] placed Newman under arrest* for  
20 his involvement with the stolen vehicle and handcuffed him behind his back,  
21 advising him of such.

22 Id. (emphasis added). Finally, in response to being placed under arrest, Newman  
23 "spontaneously" remarked "How can it be stolen if the keys are in it." Id. Shortly thereafter,  
24 Officer Pittatsis conducted a search incident to arrest and found two plastic sandwich baggies  
25 containing white powder, a plastic ziplock baggy containing white powder, drug  
26 paraphenalia, a .22 semi auto handgun, as well as Newman's personal items. Id. Inside  
27 Newman's wallet, Officer Pittatsis found a second ziplock baggy containing white powder.  
28 Id. Significantly, Officer Pittatsis' DR does not include any reference to either the hand  
signal or conversation with Officer Roberts as he brought Newman to the patrol vehicle.

1 Later, during the interview with defense counsel, Officer Pittatsis modified in material  
2 respects his recollection of what occurred. He told defense counsel that he approached  
3 Newman and immediately conducted an officer safety pat down. In contrast to his DR, he  
4 stated that he did not "immediately" place Newman under arrest but, instead, removed the  
5 .22 semi auto handgun during the pat down. IR at 21. Again, Officer Pittatsis did not  
6 mention observing Officer Roberts' signal or engaging in any conversation. Officer Pittatsis  
7 offered his opinion that he believed probable cause existed to arrest Newman for the stolen  
8 vehicle because he was originally standing by the trunk and facing the driver. *Id.* at 10.

9 Officer Pittatsis' third and last recitation of the facts occurred during the February 20,  
10 2003 hearing, when he clarified and corrected his earlier accounts. First, he explained that,  
11 after reviewing his DR, he realized that he mistakenly informed defense counsel that he  
12 removed the handgun from Newman during the pat down. TR at 13-4. Rather, Officer  
13 Pittatsis explained that he removed *no* objects from Newman's pockets, but "placed Mr.  
14 Newman in handcuffs, *detaining* him for . . . being involved with a stolen vehicle." TR at  
15 14 (emphasis added). Later, in response to further questioning and a refreshed memory,  
16 Officer Pittatsis unequivocally stated that at that moment he "arrested" Newman, and placed  
17 him in handcuffs. TR at 25<sup>2</sup>, 31-32.<sup>3</sup> Significantly, Officer Pittatsis also informed the Court  
18 that he understood the difference between an investigative detention and an arrest. TR at 31.

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22 <sup>2</sup> A. That I contacted him [Newman] and detained him.

23 Q. And in your DR you wrote that you arrested him?

24 A. Yes, it does say I arrested him.

25 Q. Okay. Did you in fact arrest him?

26 A. He was - - *he was arrested, yes.*

27 Q. Okay. Thank you.

28 <sup>3</sup> Q. And when you initially put Mr. Newman in handcuffs, did you consider him  
under arrest, or where you detaining him to investigate his involvement in the stolen vehicle?

A. According to my report, *I arrested him.*

1 To clarify whether Officer Pittatsis placed Newman under arrest or merely detained  
2 him, the Court directly questioned Officer Pittatsis:

3 THE COURT: . . . When did that conversation occur with him [Newman]  
4 concerning the - - or if it was a conversation, statements, remarks, comments,  
5 when did that occur with respect to your first encounter with him?

6 THE WITNESS: That took place at my first encounter with him after I patted  
7 him down. *Then I handcuffed him and advised him that he was under arrest*  
8 *for his involvement with a stolen vehicle.*

9 . . .

10 THE COURT: Okay. Then tell me about the conversation you had.

11 THE WITNESS: According to my DR, that's when he asked - - according  
12 to my report, that's when he asked me, "How is it stolen if the keys are in it?"

13 THE COURT: All right. So after you told him that he was arrested for  
14 his involvement with the car, did you specifically say just that, or did you say  
15 for theft of a vehicle?

16 THE WITNESS: I believe that I told him it was because the vehicle was  
17 stolen.

18 THE COURT: Okay. And so then he volunteered?

19 THE WITNESS: Yes.

20 TR at 33-4. Officer Pittatsis informed the Court that the volunteered, spontaneous comment  
21 made by Newman was: "How can it be stolen, the keys are in the car." TR at 16-7.

22 Officer Pittatsis concluded that probable cause existed to arrest Newman for the crime  
23 of stealing the vehicle based on prior information that Newman was not an occupant of the  
24 house, that domestic violence had occurred in the house, that stolen vehicles had been found  
25 on the street, that Newman stood by the trunk of the car and moved away to the house, and  
26 attempted to open the door while on a cell phone. Officer Pittatsis added that, based on his  
27 experience as a patrol officer, Newman's behavior was consistent with other suspects who  
28 demonstrate consciousness of guilt by attempting to flee or leave the scene of the crime. TR  
at 14.

Officer Pittatsis then led Newman to the patrol car, where he said he engaged in a  
"brief contact" with Officer Roberts, and Officer Roberts then advised him that Newman

1 "was good for number one," i.e. probable cause existed to arrest him for his involvement with  
2 the stolen vehicle. TR at 15. Significantly, Officer Pittatsis did not recall in any of his three  
3 recitations of the facts that Officer Roberts used hand signals. TR at 16. According to  
4 Officer Pittatsis, he conducted his search approximately two minutes after pulling up to the  
5 house. TR at 26-7.

6 During questioning by the Court following the direct and cross-examination, Officer  
7 Pittatsis clarified the timing of the events. He explained that Officer Roberts' questioning  
8 of the woman occurred at the same time he questioned and arrested Newman. TR at 35-6.  
9 Moreover, Officer Pittatsis reiterated that he failed to recall any sharing of information  
10 between himself and Officer Roberts *prior* to his arrest of Newman. TR at 36-7.

## 11 DISCUSSION

12 Officers Pittatsis and Roberts were the only witnesses who testified at the evidentiary  
13 hearing. Primarily, because their testimony contradicted each other on material issues, the  
14 evidence is not sufficient to establish probable cause existed at the time that Newman was  
15 arrested by Officer Pittatsis. In particular, considering the totality of the evidence existing  
16 at the time of the arrest, but particularly the testimony of Officer Pittatsis, the arresting  
17 officer, there is insufficient evidence to establish probable cause. Concomitantly, even if  
18 probable cause existed at the time Officer Roberts signaled Officer Pittatsis, because Officer  
19 Pittatsis was unaware of such communication, probable cause for the arrest was lacking.

### 20 1. Legal Standard

21 Probable cause exists when police officers possess "reasonable trustworthy  
22 information sufficient to warrant a prudent person in believing that the accused had  
23 committed or was committing an offense," United States v. Del Vizo, 918 F.2d 821, 825 (9th  
24 Cir. 1990) (quoting United States v. Delgadillo-Velasquez, 856 F.2d 12992, 1296 (9th Cir.  
25 1988)), and "must exist from facts and circumstances known to the officers *at the moment*  
26 *of the arrest*." Delgadillo-Velasquez, 856 F.2d at 1298 (emphasis in original); Rohde v. City  
27 of Roseburg, 137 F.3d 1142, 1144 (9th Cir. 1998). The inquiry is determined from the point  
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1 of arrest, "prior to any search conducted incident to the arrest." Id. at 825-26 (citing United  
2 States v. Potter, 895 F.2d 1231, 1233-34 (9th Cir. 1990)). The test for probable cause is an  
3 objective test, although the experience and expertise of the police officer are relevant. Terry  
4 v. Ohio, 392 U.S. 1, 21-2 (1968). For warrantless arrests, the government bears the burden  
5 of showing it did not violate the Fourth Amendment. United States v. Valencia, 24 F.3d  
6 1106, 1108 (9th Cir. 1994).

7 **A. The Defendant Was Not Held for an Investigative Detention**

8 The Government argues that at first Officer Pittatsis merely detained Newman briefly,  
9 rather than arrested him. Under Terry, an officer may stop an individual, without probable  
10 cause, if she reasonably suspects criminal activity, question him briefly, and perform a  
11 limited pat down frisk for weapons. Terry, 292 U.S. at 22-24; Rohde, 137 F.3d at 1144. To  
12 determine whether a Terry stop turned into an arrest, a Court must consider the "totality of  
13 the circumstances." United States v. Rousseau, 257 F.3d 925, 929 (9th Cir. 2001) (quoting  
14 Del Vizo, 918 F.2d at 824)). The Court considers the intrusiveness of the stop and the  
15 justification for using such tactics. Id.; Washington v. Lambert, 98 F.3d 1181, 1185 (9th Cir.  
16 1996) (noting that when analyzing whether a Terry stop or arrest occurred, the court  
17 considers (1) the aggressiveness of the methods used by police and the degree to which the  
18 suspects liberty was restricted and (2) whether the officer had sufficient basis to fear for his  
19 safety warranting a more intrusive action); Del Vizo, 918 F.2d at 824-5 (noting that  
20 brandishing of weapons and handcuffing of detainee does not necessarily convert Terry stop  
21 into arrest, but it is an arrest when the suspect is completely cooperative and there is no  
22 indication he is dangerous that would justify the officers' aggressive actions).

23 However, if the officer informs the detained individual he is under arrest, the  
24 detention is no longer considered a Terry stop. Rohde, 137 F.3d at 1144 ("In this case,  
25 however, the restraint of the Rohdes necessarily crossed the line from [an] investigatory stop  
26 to arrest because [the suspects] were told that they were under arrest. The officers' actions  
27 therefore constituted an arrest, which must be justified by probable cause."); United States  
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1 v. Delgadillo-Velasquez, 856 F.2d 1292, 1295-6 (9th Cir. 1988) (holding reasonable persons  
2 would not believe themselves free to leave after being *informed* they were under arrest and  
3 the police drew weapons on them, ordered them to halt, required them to lie face down on  
4 the street, and handcuffed them). Probable cause is required for the detention. Id.

5 **B. The Collective Knowledge Rule Does Not Establish Probable Cause**

6 In United States v. Hensley, 469 U.S. 221, 232 (1985), the Supreme Court established  
7 that the officer involved in a stop is not required to be personally aware of all the facts  
8 justifying the intrusion upon the defendant's Fourth Amendment rights. It suffices if the  
9 officer, aware of such facts, *relays* his reasonable suspicion to the officer effecting the Terry  
10 stop, *who may then rely upon it*. Id. This doctrine is understood to be the collective  
11 knowledge rule. In the Ninth Circuit and elsewhere it is applied in both the arrest and  
12 detention contexts. See, e.g., Del Vizo, 918 F.2d at 826.

13 In United States v. Conner, 948 F. Supp. 821, 841 (N.D. Iowa 1996), the District  
14 Court provided a thoughtful, detailed, and comparative history of the collective knowledge  
15 principle as applied among the various circuits, noting that in the Ninth Circuit, there is a  
16 requirement of "communication among the officers in order to invoke the [rule]," but that the  
17 opinions are somewhat confusing. At times the Ninth Circuit appears to hold that the  
18 collective knowledge rule is applicable even if the officer with reasonable suspicion neither  
19 relays the suspicion nor the underlying facts leading to his suspicion to the arresting officer.  
20 Id. at 841-42; see, e.g., United States v. Butler, 74 F.3d 916, 921 (9th Cir. 1996) ("Probable  
21 cause can also be demonstrated through the collective knowledge of police officers involved  
22 in an investigation, even if some of the information known to other officers is not  
23 communicated to the arresting officer."); United States v. Bernard, 623 F.2d 551, 561 (9th  
24 Cir. 1979) (holding collective knowledge rule allowed court to consider information  
25 possessed by officers never relayed to arresting officer because all officers "were working  
26 in close concert"). At other times, the Ninth Circuit has unmistakably held that the collective  
27 knowledge rule applies only when there has been some material communication among the  
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1 officers. See, e.g., Valencia, 24 F.3d at 1108; Del Vizo, 918 F.2d at 826. However, on close  
2 examination of the two doctrines, they can be reconciled. It is apparent that *some*  
3 *communication* actually did occur in the Ninth Circuit cases where the court did not expressly  
4 require it.

5 First, in Butler, one of the arresting officers received information during roll call that  
6 an informant reported that Butler induced the informant to accept a stolen vehicle as a trade-  
7 in and that the informant saw Butler with the stolen vehicle at a specific location. Butler, 74  
8 F.3d at 919-20. The arresting officer then drove to the location, found a man matching the  
9 informant's description of Butler driving the stolen vehicle, and arrested him for possession  
10 of stolen property. Id. at 919. Butler argued that there was no probable cause at the time of  
11 the arrest because the arresting officer never conducted an independent investigation to  
12 corroborate the informant's crime report. Id. at 920. However, the Ninth Circuit disagreed,  
13 holding that an officer may arrest based on information *relayed* to him through official police  
14 channels. Id. (citing United States v. Calhoun, 542 F.2d 1094, 1100 (9th Cir. 1976)).

15 Second, in Bernard, the arresting officer relied on the opinion of two other officers  
16 that probable cause existed to arrest. Bernard, 623 F.2d at 560. These other officers based  
17 their opinion on the observations of a fourth officer. Id. The observations of the fourth  
18 officer were never directly communicated to the arresting officer. Id. The Ninth Circuit held  
19 that the arresting officer could rely upon information known to the two other officers,  
20 including the information from the fourth officer that had not been directly shared with or  
21 communicated to him, because the two other officers did communicate their opinion  
22 regarding probable cause, including the information from the fourth officer. The court found  
23 that the arresting officer relied on the opinions "to a great degree" when making the final  
24 decision to arrest. Id.

25 Therefore, in both cases the Ninth Circuit followed the Supreme Court's ruling in  
26 Hensley, requiring some minimal level of information regarding probable cause be  
27 communicated among the officers in order to apply the collective knowledge rule.

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1 **2. Analysis**

2 The government contends probable cause existed when Officer Pittatsis arrested  
3 Newman because:

- 4 1) Officers knew that the car parked on the street . . . was stolen.
- 5 2) Officers knew the house, in front of which the stolen car was parked, was  
6 known for illegal [domestic dispute] activity . . .
- 7 3) The officers patrolled the neighborhood on a regular basis, knew the occupants  
8 of the house, and knew [Newman] and the [woman] driver . . . did not live at  
9 the house.
- 10 4) When officers turned around to return to the house after learning the vehicle  
11 was stolen, they observed [Newman] walk toward the house and try to enter it.
- 12 5) Based on Officer Pittatsis' training and experience, [Newman] behaved  
13 similarly to other individuals who are involved in criminal activity and try to  
14 distance themselves from that activity when police officers approach.<sup>4</sup>
- 15 6) While Officer Pittatsis was patting down [Newman] . . . , [Newman] asked the  
16 officer how the vehicle could be stolen if it had the keys in it.

17 <sup>4</sup> The Court required the parties to submit supplemental briefing on the evidentiary  
18 foundation required to admit Officer Pittatsis' opinion. Fed. R. Crim. P. 104(a) relaxes the  
19 rules of evidence in suppression hearings. "The evidence need support 'only the probability,  
20 and not a prima facie showing, of criminal activity.' . . . and such evidence need not be  
21 admissible, but only legally sufficient and reliable." Franklin v. Fox, 312 F.3d 423, 438  
22 (citing Illinois v. Gates, 462 U.S. 213, 235 (1983)). In determining if probable cause exists,  
23 officers may draw reasonable inferences from the facts and circumstances in light of their  
24 knowledge and prior experience. Valencia, 24 F.3d at 1108.

25 Under Fed. R. Evid. 701(c), lay witnesses may not offer opinion testimony "based on  
26 scientific, technical or other specialized knowledge within the scope of Rule 702." In  
27 Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), the Supreme Court  
28 addressed the admissibility of scientific expert evidence and held that Fed. R. Evid. 702  
imposes a "gatekeeping" obligation on the trial judge to "ensure that any and all scientific  
testimony is not only relevant, but reliable." Id. at 589. The Ninth Circuit has applied  
Daubert expert witness analysis to police officers seeking to offer their expert opinions on  
criminal behavior. See, e.g., United States v. Figueroa-Lopez, 125 F.3d 1241 (9th Cir. 1997).

Therefore, while under Fed. R. Crim. P. 104(a), Officer Pittatsis' opinion is reviewed  
under a relaxed standard of review. Daubert, of necessity, still requires that the Court first  
determine if the opinion testimony is relevant and reliable before allowing it to be considered  
as a basis for establishing probable cause.

First, Officer Pittatsis' opinion is reliable. Officer Pittatsis completed extensive  
training with the police department and has over five years of experience as a patrolman.  
Second, Officer Pittatsis' opinion is reasonably related to his experience. Newman's actions  
did display consciousness of guilt. Individuals only display consciousness of guilt after  
having committed a wrong, such as the crime of stealing a vehicle. Therefore, the Court will  
consider Officer Pittatsis' opinion when making its ruling on the Motion to Suppress.

- 1 7) As this was occurring, Officer Roberts was interviewing the driver . . . who was  
2 "very upset." Officer Roberts asked the driver if [Newman] had come to the  
3 house with her to which she answered "Yes, that's my boyfriend."  
4 8) While Officer Pittatsis walked [Newman] back to the police car after placing  
him in handcuffs, Officer Roberts indicated to Officer Pittatsis that the  
defendant was a "number one," meaning he could be arrested. Thereafter, the  
officer searched the defendant and found drugs and a gun.

5 (Supp. Response at 2).

6 Officer Pittatsis, after informing the Court he understood the difference between a  
7 Terry stop detention and arrest, admitted he *informed Newman he was arrested* at the time  
8 he placed him in handcuffs. Therefore, Officer Pittatsis must have had probable cause to  
9 arrest Newman for his involvement with the stolen vehicle *at the moment he cuffed Newman*  
10 *and informed him of his arrest status*. See Rohdes, 137 F.3d at 1144 (holding handcuffing  
11 and informing suspects they are under arrest sufficient to convert Terry stop into an arrest).  
12 The government's eighth enumerated reason for finding probable cause occurred *after* Officer  
13 Pittatsis placed Newman in handcuffs and informed him of his arrest status. Therefore, it  
14 cannot be used to establish probable cause for the arrest that had already occurred.

15 Further, since Officer Pittatsis never observed Officer Roberts' earlier hand signal  
16 indicating Officer Roberts' opinion that probable cause existed to arrest Newman, it cannot  
17 be considered under the collective knowledge theory. See, e.g., Conner, 948 F. Supp. at 842  
18 (officer's observations were not pooled into the collective knowledge of the arresting officers  
19 because the officer did not tell the arresting officers what he learned nor did the arresting  
20 officers observe the officer's gesture indicating his finding).<sup>5</sup>

21 Finally, and significantly, the Government's reliance on Newman's spontaneous  
22 statement will not be considered to establish probable cause because, due to the ambiguity  
23 surrounding the timing of events and Officer Pittatsis' clarifying testimony in his colloquy  
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25 <sup>5</sup> Even if the Court considered Officer Roberts' information, it fails to establish  
26 probable cause. The woman driver's ambiguous response of "Yes, he is my boyfriend" to a  
27 battery of questions by Officer Roberts creates only surmise that Newman accompanied her  
28 to the house in the vehicle knowing it was stolen. See DR at 12; TR at 69-70 (reciting  
Officer Roberts asked woman *several* questions before she responded, including (1) if the  
man standing at the front door was with her and (2) if he had been in the car with her).

1 with the Court, the evidence demonstrates that Newman made the comment after Officer  
2 Pittasis informed him of the arrest and placed him in handcuffs. Compare DR at 5 (stating  
3 comment occurred after Newman's arrest); TR at 33-4 (same); with TR 16-7 (indicating  
4 comment occurred while searching Newman, but before placing him under arrest); see  
5 Rohdes, 137 F.3d at 1144 (holding events after the arrest cannot be part of the basis for  
6 establishing probable cause for the arrest).

7 Therefore, only the Government's first five enumerated bases for establishing probable  
8 cause have been considered. In Rohde, the Ninth Circuit held that when a person operates  
9 a vehicle she is effectively in possession of the vehicle and can reasonably be presumed to  
10 be aware of its ownership. Rohde, 137 F.3d at 1144. However, the reasoning that creates  
11 probable cause to arrest the driver does not extend to the passenger. Id. No probable cause  
12 exists for arresting a passenger "[a]bsent some indication of a relationship more substantial  
13 than that of driver and passenger, the arresting officer cannot simply impute the driver's  
14 presumptive awareness of the vehicle's legal condition to the passenger." Id. In Rohde, the  
15 Ninth Circuit suggested that if the arresting officers established the passenger of the car was  
16 the mother of the driver prior to arrest, this familial connection would have sufficed to  
17 presume the mother was aware of the vehicle's legal condition. Id. at 1144-45.

18 In this case, the government's evidence falls short of establishing that Officer Pittasis  
19 knew Newman was a passenger in the vehicle. Newman's connection with the vehicle and  
20 the driver at the time of his arrest was even more nuanced than that of a passenger in Rhode.  
21 Newman was outside the vehicle and walking away from it. Moreover, Officer Pittasis  
22 admitted he knew of no relationship between Newman and the driver prior to the arrest that  
23 would suggest that Newman would be aware of the vehicle's legal condition. While Officer  
24 Pittasis knew of other stolen vehicles that had been recovered in the area and, his experience  
25 led him to conclude that Newman walked in a manner suggesting consciousness of guilt, the  
26 evidence is too tenuous to establish probable cause at the moment of the arrest. See, e.g., Id.  
27 Lastly, even if the Court considers Officers Roberts' and Pittasis' testimony together, and  
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1 in the most favorable light, despite the lack of communication between them, it is an  
2 assortment of inconsistent recollections of events such that the Court cannot with any degree  
3 of comfort discern when the moment of arrest occurred.<sup>6</sup> Obviously, this timing is necessary  
4 to determine whether probable cause existed. Therefore, the Motion to Suppress will be  
5 granted.

6 Accordingly,

7 **IT IS THEREFORE ORDERED** that Defendant Billy Ray Newman's Motion to  
8 Suppress is **GRANTED**.

9 DATED this 12 day of May, 2003.

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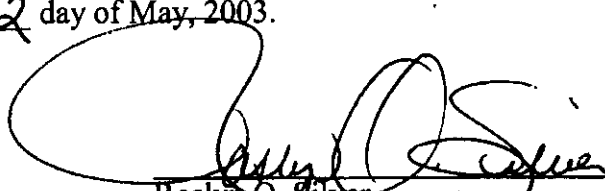
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Roslyn O. Silver  
United States District Judge

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<sup>6</sup> For example, Officer Roberts' testified that Officer Pittatsis' responded to his hand signal by placing handcuffs on Newman, and presumptively arresting him (TR at 57), while Officer Pittatsis testified he never observed any hand signal prior to arresting Newman (TR at 16). Additionally, Officer Pittatsis stated at various times that he "immediately" arrested Newman (DR at 5), arrested Newman after a pat down (IR at 21); and arrested Newman after first "detaining him" and speaking with Officer Roberts (TR at 14-6).